

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER TAX
DECISION NO. T-75-39/T-75-40 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

CHARTED SERVICES OF CALIFORNIA
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-406

Employer Account No.
DEPARTMENT OF BENEFIT PAYMENTS

FORMERLY TAX DECISION No. T-75-39/T-75-40

The petitioner, Charted Services of California, appealed from that part of the decision of the administrative law judge which denied a petition for reassessment with respect to payments made to F. Donald Addis (T-75-39) and with respect to a denial of an assessment for California personal income tax withholding on the payments made to the said F. Donald Addis (T-75-40).

The petitioner, Charted Plans Corporation, did not appeal from the decision of the administrative law judge.

STATEMENT OF FACTS

F. Donald Addis has been a successful life insurance salesman for a number of years. He was the sole owner of a life insurance agency until it was incorporated in October 1971, at which time he became the president and the sole stockholder. Addis then functioned as president of the corporation in administering the business for several hours a day, but he also continued in the capacity of a life insurance salesman, at which he was engaged after the hours necessary for his administrative functions.

The petitioner engaged several life insurance salesmen as well as office help. The salesmen and Addis, upon completion of a policy sale, would receive a regular commission check, plus an override commission. Commission checks were payable to the petitioner corporation, which in turn paid the salesmen (including Addis) their commission by issuing a check from Charted Services of California. This arrangement was in effect with respect to payments to Addis as well as the other salesmen. The override commission was used to pay office expenses. Addis testified that he received less than the full amount of his commission checks because he had to expend some of his commission earnings to keep the petitioner corporation in operation. The petitioner did file an income tax return and showed a small profit. The Department's position is that Addis would not work the number of hours to which he has testified in administering the petitioner's business unless he was compensated for that time. Addis' position is that he hopes to increase the petitioner's business to the point where he may be able to at some time in the future draw a salary for his services to the petitioner.

REASONS FOR DECISION

The mere fact that a corporation is solely owned by one individual, who is also an officer and director, is not in itself sufficient reason to disregard the corporate entity. Unless there is also some accompanying fraud or inequity to third persons, alter-ego principles do not apply. In this case no basis has been shown for disregarding the separate legal entity of the petitioner. In fact, the petitioner itself is not seeking to have its separate legal entity disregarded. Such a disregard of corporate entity would be contrary to the principles expressed by the California Supreme Court in Evelyn, Inc. v. California Unemployment Stabilization Commission (1957), 48 Cal. 2d 588 at pages 590 and 591, 311 P. 2d 500 at page 502.

There is no question that in his capacity of president of the petitioner corporation, F. Donald Addis is an employee of the corporation. Even before the enactment of Unemployment Insurance Code section 621 an officer of a corporation was recognized as having that status under common law principles where he was compensated for services rendered in that capacity. Code section 621 now specifically states that an officer of a corporation is an employee.

However, the petitioner does question the status of Addis in regard to the services rendered in selling insurance for it. It is the petitioner's contention that these services were rendered in a separate transaction in which Addis was engaged as an independent contractor.

It has long been recognized that the relationship of employer and employee and that of principal and independent contractor are mutually exclusive. They cannot exist simultaneously with respect to the same transaction. Because of their mutually exclusive character, the proof of one status automatically precludes the existence of the other.

Such, however, is not the rule where different transactions are involved even though they are carried on simultaneously. Ever since the case of Knight v. Fox & Henderson (1850), 5 Exch. 721, 155 Eng. Rep. 316, the common law has recognized that an employee may in a separate transaction with his employer have the status of an independent contractor. This principle has been recognized and applied in a number of California cases. Hedge v. Williams (1901), 131 Cal. 455, 63 Pac. 721, 64 Pac. 106; State Compensation Insurance Fund v. Industrial Accident Commission (1934), 2 Cal. 2d 94, 39 P. 2d 201; Guth v. Industrial Accident Commission (1941), 44 Cal. App. 2d 72, 112 P. 2d 969.

This principle is also being recognized and applied by the Internal Revenue Service in the administration of federal employment taxes. In Revenue Ruling 58-505, 1958-2 Cum. Bul. 728, the Service ruled that officers of a company engaging in the insurance business, who sell insurance policies for the company, aside from and independent of the duties as officers, are employees of the company with respect to the duties performed by them as officers, but are not employees with respect to their selling activities. While we are not conclusively bound by this ruling, it is a fact to which we must not only give consideration but one to which we must accord great weight in reaching our decision (Appeals Board Decision No. P-T-104).

While the foregoing amply supports the petitioner's position that it may engage the services of its officers as independent contractors in regard to separate transactions not involving their administrative duties on behalf of the corporation, it remains only to be considered whether the arrangement established was an independent one.

Addis has been a successful life insurance salesman for many years. The work of selling was done away from the petitioner's premises in contacting prospects selected by Addis. He performed all of the work after his regular hours in an administrative capacity for the petitioner. Payment was by commission, with an override to the petitioner corporation.

While it is true that the commission checks were paid directly by various insurance companies to the petitioner, the funds are directly traced to the sales made by Addis. Addis is working in the capacity of president of the petitioner corporation in the prospect that at some future time the operation of the petitioner based on override commissions will be successful and will enable the petitioner to pay him a salary as president. On the basis of the record as it now stands we must find that the payments made to Addis are in fact commissions for life insurance sold, in which Addis operated as an independent contractor.

DECISION

That part of the decision of the administrative law judge from which the petitioner appealed is reversed. The petition for reassessment with respect to payments made to Addis is granted (T-75-39) and the petition for reassessment with respect to personal income tax withholding on payments made to Addis is likewise granted (T-75-40). The decision of the administrative law judge in its other respects shall stand.

MARILYN H. GRACE

RICHARD H. MARRIOTT

DON BLEWETT

Pursuant to section 409 of the Unemployment Insurance Code, the above Tax Decision No. T-75-39/T-75-40 is hereby designated as Precedent Decision No. P-T-406.

Sacramento, California, March 27, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MARILYN H. GRACE

HARRY K. GRAFE

RICHARD H. MARRIOTT

HERBERT RHODES

CONCURRING and DISSENTING -
Written Opinion Attached

DON BLEWETT, Chairperson

CONCURRING AND DISSENTING OPINION

I concur in the principle enunciated in this case. I dissent as to the procedural inadequacies inherent in the adoption of this case as a precedent.

When this case was originally issued I fully agreed with the principle and the decision. However, at that time I had the advantage of a complete recitation of the facts as contained in the administrative law judge's decision. All of those facts are not contained in the Board's precedent, and it is inappropriate to append the administrative law judge's decision to that of the precedent. In this posture it is my opinion that the precedent does not thoroughly portray all of the facts that are necessary to a full understanding of the case.

I do not think that we should issue a precedent decision that leaves any doubt as to what took place. In this instance there is doubt because without the administrative law judge's decision it is not clear whether Addis received any remuneration for his administrative services.

The situation presented by this case occurs with sufficient frequency that we would be well advised to wait for another case to come along involving this same principle for issuance as a precedent.

DON BLEWETT